

Message Text

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PAGE 01 STATE 015216

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FM SECSTATE WASHDC

TO TT/LNO HONOLULU HAWAII IMMEDIATE

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E.O. 11652: N/A

TAGS: OGEN, US

SUBJECT: LEGAL OPINION ON KINKAID

DOTA NO. 008-MS

FOLLOWING IS TEXT OF TELEX SENT TO ZEDER ON KWAJELIN.
PLEASE MAKE SURE HE RECEIVES THIS AND THE FOLLOWING LEGAL
OPINION UPON HIS ARRIVAL HONOLULU.

HOWARD K. HODDICK OF ANTHONY, HODDICK, REINWALD AND
O'CONNOR, 333 QUEEN STREET, HONOLULU, HAWAII, TELEPHONE:
537-1941, ATTORNEYS FOR KINKAID, WANT TO MEET WITH YOU IN
HONOLULU. IF YOU AGREE HAVE BOB LAW ARRANGE APPOINTMENT.
COPY OF DARNER LEGAL OPION IS BEING CABLED TO BOB LAW.
END OF TEXT OF TELEX.

FOLLOWING IS TEXT OF MY MEMORANDUM TO OFFICE OF
SOLICITOR:
SUBJECT: KINCAID DISPENSARY MATTER IN TRUST TERRITORY.

ATTACHED HEREWITH PLEASE FIND A COMPLETE, INDEXED FILE ON
THE KINCAID DISPENSARY MATTER IN THE TRUST TERRITORY.
PLEASE REVIEW THE SAME AND LET US HAVE YOUR ORAL ADVICE
RELATIVE TO THE MATTER.

UNCLASSIFIED

UNCLASSIFIED

PAGE 02 STATE 015216

I WOULD ALSO APPRECIATE YOUR WRITTEN OPINION AS TO THE FEASIBILITY AND PRACTICALITY OF THE TRUST TERRITORY GOING AHEAD AND COMPLETING CONSTRUCTION OF THE REMAINING 32 DISPENSARIES UTILIZING CAT TEAMS OR PRIVATE CONTRACTORS SINCE MATERIALS FOR THE REMAINING DISPENSARIES ARE ALREADY IN THE TRUST TERRITORY. YOU MAY WISH TO CONSULT WITH HEW ATTORNEYS FOR THEIR OPINION AS I UNDERSTAND FROM MISS JOHNSON OF MY STAFF THAT HEW HAS TAKEN THE VIEW THAT COMPLETION OF THE DISPENSARIES BY THE TRUST TERRITORY WOULD PREJUDICE LATER SUITS BY THE TRUST TERRITORY INVOLVING KINCAID OR ITS BONDING COMPANY.

YOU WILL FIND IN THE FILE A REFUSAL OF THE BONDING COMPANY TO COMPLETE THE DISPENSARIES ON BEHALF OF KINCAID. PLEASE ADDRESS YOUR OPINIONS SPECIFICALLY AS TO WHETHER THE TRUST TERRITORY SHOULD MITIGATE ITS DAMAGES BY PROCEEDING WITH CONSTRUCTION BY UTILIZING CAT TEAMS OR OTHER CONTRACTORS.

SIGNED EMMETT RICE. END OF TEXT OF LETTER. (11/11/75)

FOLLOWING IS TEXT OF TOM DARNER IN OFFICE OF SOLICITOR.
RE: TT CONTRACT 173-125.

THIS IS IN RESPONSE TO YOUR REQUEST FOR MY REVIEW AND COMMENTS ON EMMETT RICE'S MEMORANDUM RELATING TO THE ABOVE-REFERENCED CONTRACT. THE MEMORANDUM REQUESTS OUR OPINION ON THE FEASIBILITY AND PRACTICALITY OF THE TTPI COMPLETING CONSTRUCTION OF THE REMAINING DISPENSARIES USING CAT TEAMS OR PRIVATE CONTRACTORS. HE ALSO REQUESTS ANY GENERAL ADVICE WE MAY HAVE RELATIVE TO THE MANNER IN WHICH THE TTPI IS NOW PROCEEDING IN THIS MATTER.

I HAVE REVIEWED THE FILE DOCUMENTS SUPPLIED BY THE OFFICE OF TERRITORIAL AFFAIRS. THE TRANSCRIPT OF THE DEPOSITION OF JAMES WHEELER SUPPORTS MY INITIAL EVALUATION OF THE CURRENT LITIGATION, I.E. THE TTPI'S CHANCES OF HAVING THE JANUARY 17, 1975 AGREEMENT DECLARED NULL AND VOID ARE EXTREMELY LOW (SEE MY MEMORANDUM TO ACTING ATTORNEY GENERAL, TTPI, DATED JULY 9, 1975.) LEGAL EFFORTS AT THIS POINT IN TIME SHOULD BE DIRECTED TOWARDS MINIMIZING UNCLASSIFIED

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PAGE 03 STATE 015216

THE AMOUNT OF ANY TERMINATION FOR CONVENIENCE CLAIM KINCAID MAY HAVE ONCE THE DEFAULT IS CONVERTED INTO A CONVENIENCE TERMINATION. THE POLITICS OF THE SITUATION WOULD APPEAR TO REQUIRE THE TTPI TO CONTINUE TO SUPPORT THE DEFAULT ACTION.

THIS OFFICE IS NOT IN A POSITION TO PROSECUTE THE GOVERNMENT'S CASE. IF DAY-TO-DAY CONSULTATION IS NEEDED BY THE

TTPI OFFICIALS (INCLUDING THE AG'S OFFICE) WE MIGHT CONSIDER SETTING UP SOME ARRANGEMENT FOR THEM TO GET ADVICE FROM NAVY PROCUREMENT OFFICIALS (ANY ATTORNEYS) ON GUAM.

AS TO EMMETT'S SPECIFIC QUESTION ON COMPLETING CONSTRUCTION, IT IS MY OPINION THAT THE TTPI SHOULD MOVE AHEAD. THERE IS SOME DANGER WHEN WE HAVE THE WORK DONE BY OUR OWN FORCES OR THE CAT TEAMS. THE PROBLEM LIES IN OUR ABILITY TO PROVE THAT THE ADDITIONAL COSTS TO COMPLETE ARE REASONABLE. THE COMPETITIVE BIDDING SYSTEM FILLS THE REQUIREMENTS FOR PROOF OF A FAIR PRICE FOR COMPLETION OF THE WORK. USE OF THE CAT TEAMS WILL REQUIRE A MORE DETAILED PRESENTATION, NOT THAT WE CANNOT MEET THE BURDEN OF PROOF, THE TASK IS JUST MORE DIFFICULT. I DOWN-PLAY THIS PROBLEM SINCE IT IS MY OPINION WE WILL NEVER BE ABLE TO COLLECT EXCESS COSTS IN ANY EVENT.

BEFORE ACTION IS TAKEN TO COMPLETE CONSTRUCTION, IT IS IMPORTANT TO GET THE CONCURRENCE OF HEW, SAN FRANCISCO. THE FILE INDICATES HEW ADVISES AGAINST OUR TAKING ACTION AT THIS TIME TO COMPLETE THE WORK. WHETHER THIS IS A POSITION TAKEN WITH THE CONCURRENCE OF HEW ATTORNEYS IS NOT KNOWN. THE TTPI MUST DISCUSS THIS WITH HEW. INVOLVEMENT OF HEW ATTORNEYS SHOULD BE REQUIRED. WE NEED A CLEAR STATEMENT OF THE LEGAL BASIS FOR THEIR

APPARENT CONTRARY POSITION. THE TTPI SHOULD NOT MOVE AHEAD UNTIL THERE IS AGREEMENT WITH HEW ON AN ACCEPTABLE PLAN OF ACTION.

UNCLASSIFIED

UNCLASSIFIED

PAGE 04 STATE 015216

THERE IS NOTHING THIS OFFICE CAN DO TO INSURE A FAVORABLE RESULT IN THE CURRENT DISPUTE WITH KINCAID. THE GOVERNMENT'S POSITION WAS LOST WHEN WHEELER SIGNED THE JANUARY 17, 1975 LETTER AGREEMENT.

I AM AVAILABLE TO DISCUSS THIS MATTER WITH YOU AT ANY TIME.

SIGNED, THOMAS A DARNER. 1/20/76.

ACTING DOTA RICE SEND.S.

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